OFFICERS & EMPLOYEES

1. Conflict of interest, claims, contract.
2. De Facto.
3. Foreign Government Presents, Titles., Etc.
4. Liability.
5. Training.
6. Transfers.
7. Vested Rights - Deprivation of.

Title Legal Decisions

15 June 1944

MEMORANDUM

TO : Executive Officer

FROM: Office of General Counsel

SUBJECT: Avoidance of Conflicts of Interest by OSS Personnel

This memorandum is in response to your request for a statement on the Federal statutes generally prohibiting officers and employees of the United States from in any way interesting themselves in claims against the United States. In a broad sense, these statutes impose a standard of undivided loyalty to the interests of the government to which all officers and employees are required to adhere, under penalty of severe criminal punishment.

There is little difficulty in applying these statutes to cases of actual conflict of interest, which are legally as well as morally reprehensible. More difficulty arises, however, in borderline cases, not mala in se, which although involving at most a remote possibility of conflict, or no conflict at all, may yet be held to fall within the prohibition of the statutes as they have been construed in recent opinions of the Attorney General.

I.

STATUTES INVOLVED

The principal statutes involved in this field are sections 100 and 113 of the Criminal Code. Recent opinions of the Attorney General, referred to below, have indicated that these sections are applicable to practically all employees of the Federal government, as well as to officers of the armed forces.

Section 100 (18 U. S. C. c. 199), originally enacted 26 February 1853, reads as follows:

"Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than $5,000, or imprisoned not more than one year, or both. Members of the National Guard of the District of Columbia who receive compensation for their services as such shall not be held or construed to be officers of the United States, or persons holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the Government of the United States within the provision of this section."

The Supreme Court has defined a "claim against the United States" as a right to demand money from the United States (Hobbs v. Mclean, 117 U. S. 567).

The companion statute is section 113 (18 U. S. C. 203), originally enacted 11 June 1864:

"Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person,

> either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

It is understood that the Attorney General interprets "before any department", etc., to mean "with any department", so that the statute cannot be considered as applying only to quasi-judicial matters and proceedings. There is judicial authority seemingly to the contrary. U. S. v. Zeisler, 35 F. Supp. 102 (S.D.N.Y. 1940).

In addition to these general statutes, there are more specific statutes which are concerned with particular phases of the problem of conflicts of interest. Section 41 of the Criminal Code (18 U. S. C. 93), enacted 2 March 1863, prohibits government officers or agents from transacting business on behalf of the United States with any private organization in which they are interested:

> "No officer or agent of any corporation, joint-stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than $2,000 and imprisoned not more than two years."

Section 112 of the Criminal Code (18 U. S. C. 203), enacted 26 July 1868, forbids an officer or agent to receive any compensation for procuring a government office or contract:

"Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void."

Finally, section 190 of the Revised Statutes (5 U. S. C. 99) reads as follows:

"It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee."

It is well settled that this statute is applicable only to employees of the ten executive departments of the government (40 Op. Atty. Gen. no. 74, 12 December 1943), and not to independent establishments such as OSS.

II.

APPLICATION OF STATUTES

A. Civilian Personnel

Two recent opinions of the Attorney General have focused much public attention upon this problem generally and upon sections 109 and 113 of the Criminal Code in particular. In his opinion of 6 November 1943 (Vol. 40, No. 73), Attorney General Biddle held that a temporary consultant in the War Department (employed without compensation on a temporary assignment) was liable to the penalties of sections 109 and probably 113 where he or his law partners prosecuted as attorneys any claims against the United States during the period of his appointment.

In the opinion of 2 December 1943 (Vol. 40, No. 74), the Attorney General ruled that members of local War Price and Rationing Boards were officers of the United States and hence subject to sections 109 and 113, which foreclosed them from acting as attorneys and agents for the prosecution of claims against the United States. In other words, this opinion abandoned the requirements of actual conflict which was at least implicit in earlier opinions (e.g., 40 Op. Atty. Gen. no. 46, quoted below).

The effect of these opinions was twofold:

(a) For the first time it was indicated that section 109 was applicable to employees of government agencies and establishments outside the executive departments;

(b) A large number of government employees, who had previously considered themselves obliged only to avoid actual conflicts of interest, were suddenly confronted with the fact that they were in technical violation of Federal criminal statutes.

A storm of protest followed the decisions, and there were threats of widespread resignations from government service. The New York Times, 9 January 1944. Congressional

action followed with the inclusion in the revised renegotiation statutes (Title VIII of the Revenue Act of 1943) of a section limiting the applicability of sections 109 and 113 to persons employed in the principal war procurement agencies.* The section now reads (P. L. 235, 78th Cong., sec. 701(j)):

> "(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a department or the board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: Provided, That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such person was so employed, or (2) during the period such person is engaged in employment in a department."

It was recently said in Congress that the Comptroller General feared that the quoted section had greatly weakened the effect of sections 109 and 113, and that such sections were largely inoperative as to a great many Federal employees (89 Cong. Rec. 3781). It is difficult to agree with this view. The new section does not waive sections 109 and 113 as to employees who prosecute claims against the United States in the course of their employment. The most it does is to liberalize existing restrictions in the case of certain intermittent and irregular employees. Certainly the vitality of sections 109 and 113 has not been impaired as to civilian employees of many agencies such as [illegible].

In subsequent legislation, Congress has further limited the scope of these sections. A typical example is the joint resolution exempting members of OPA rationing boards (P. L. 287, 78th Cong. 2d Sess.):

> "Nothing contained in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) shall be deemed to apply to any person because of any appointment under the authority of the Emergency Price Control Act of 1942 (Public Law Numbered 421, Seventy-seventh Congress) or under authority of Title III

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* The scope of this section is not clear. It may apply to all executive departments, or only to War, Navy, and some war agencies. In any event it does not apply to OSS.

of the Second War Powers Act, 1942 (Public Law Numbered 507, Seventy-seventh Congress), as a member of a War Price and Rationing Board or to any other position in a regional, district, or local office of the Office of Price Administration, if such person is serving or has served in such capacity without compensation: Provided, however, That the provisions of this Act shall not apply to any representation before the Office of Price Administration while such person is an officer or employee of the Office of Price Administration."

Similar resolutions have been introduced to exempt counsel to special Congressional committees (P. L. 249, 248, 78th Cong., 2d Sess.).* And even before the Attorney General's two recent opinions, Congress had expressly excluded from the operation of the sections members of local draft boards (Act of May 5, 1941, 55 Stat. 160) and alien enemy hearing boards (Act of December 26, 1941, 55 Stat. 861). Legislation is now pending, modeled on the 1942 section, to exempt WOC (without compensation) and WAC (when actually employed) employees of OSRD (H. R. 4345), WPB (H. R. 4345), and the War Department (H. R. 4463).

In the light of the interpretation given these statutes by the Attorney General, it is our opinion that sections 109 and 113 must be deemed applicable to all civilian employees of OWI, including

1. Civil service employees;
2. Special funds employees;
3. WOC and WAC appointees.

If, in your opinion, circumstances warrant, Congress might be requested to enact remedial legislation exempting those in "3" from the application of these sections, although the relatively small number of WOC and WAC employees as such make the problem less acute for this agency than, for example, WPB, OSRD or WLB. As to the employees in "1" and "2", it is our judgment that Congress would not favorably regard any attempt to exclude full time officers and employees of the United States from the operation of these sections.

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* A joint resolution exempted Owen J. Roberts from the provisions of these sections before he undertook the investigation in the Teapot Dome cases (43 Stat. 5).

B. Military Personnel

Sections 109 and 113 are probably applicable to officers of the armed forces as well as to civilian officers and employees. Consequently, military officers are subject to the same restrictions as civilian employees, with the important exception that they may in some cases be permitted to receive compensation from private sources where such would be forbidden to civilian employees. This right is derived from the provisions of section 5(f) of the Selective Service and Training Act of 1940 (54 Stat. 885; 50 U. S. C. App. 305(f)):

> "Nothing contained in this or any other Act shall be construed as forbidding the payment of compensation by any person, firm, or corporation to persons inducted into the land or naval forces of the United States for training and service under this Act, or to members of the reserve components of such forces now or hereafter on any type of active duty, who, prior to their induction or commencement of active duty, were receiving compensation from such person, firm, or corporation."

The Attorney General has held that the foregoing section annulls the effect of sections 109 and 113 so far as they might prevent an officer of the armed forces from receiving compensation indirectly derived from contracts with the United States or from the prosecution of claims against the United States. After holding that the benefits of section 5(f) are applicable to officers commissioned directly under the Act of September 27, 1941 (55 Stat. 728; 10 U. S. C. 405 note), as well as to reserve officers, Attorney General Biddle held that the term "compensation", as used in section 5(f), was broad enough to include a share of the net profits resulting from work done by others. The opinion closes with this note of caution:

> "An actual or probable conflict between the Government's interest and the private interest of one of its officers would, of course, be intolerable, even in time of war, and many specific statutes and rules of law can be invoked to prevent or punish in such cases. See e. g., sections 109, 113, and 113 of the Criminal Code (secs. 198, 202, and 203, title 18, U. S. C.); section 4 of the act

of March 3, 1917, 39 Stat. 1166 (sec. 86, title 5, U. S. C.); United States v. Carter, 217 U. S. 286,306. Section 5 (f) of the Selective Training and Service Act of 1940 was not intended, in my opinion, to so suspend those statutes and rules of law as to make lawful such conflicts of interest. Whether the attorney referred to in your letter will serve in violation of those statutes and rules of law will depend upon the work to which he is assigned while on active duty."

The indication in the quoted portion of the opinion that section 109 is applicable to officers of the armed forces is contrary to an indication in an opinion given four days later (40 Op. Atty. Gen., No. 67, April 27, 1942), that section 109 does not apply to officers who do not hold positions in the War or Navy Departments, which in turn relied on an earlier opinion to the same effect (31 Op. Atty. Gen. 471). The wisdom of relying on the statement in the 27 April opinion is doubtful, as it is quite possible that the Attorney General may later directly hold (as the 25 April opinion indicates) that section 109 applies to all Army officers. Despite the 27 April opinion holding section 109 applicable only to the executive departments, a year and a half later the Attorney General held the section applicable to all employees, whether employed or appointed, (40 Op. Atty. Gen. No. 74, December 9, 1943). A similar about-face may be expected on the earlier ruling as to military officers.

In addition to sections 100 and 113, there are specific statutes applicable to military officers which relate to the conflicts of interest problem:

(a) Section 1224 of the Revised Statutes (14 Stat. 243; 10 U. S. C. 495), forbidding an Army officer to engage in any extra employment interfering with the performance of his military duties;

(b) Section 1136 of the Revised Statutes (39 Stat. 182; 10 U. S. C. 1510), forbidding officers of the Quartermaster Corps from receiving "any gain or emolument" for negotiating any business connected with the duties of their office;

(c) The Act of June 10, 1926, as amended, (44 Stat. 480; 10 U. S. C. 833), cutting of the pay of any Navy or Marine officer on the active list who is employed by any contractor furnishing naval supplies or war materials to the government.

Thus, officers of the armed forces are subject to the same general restrictions which are applicable to civilian officers and employees, and in addition to specific statutes applicable only to them. The one important exception is that, unlike civilian employees, they may continue to receive compensation from private sources even though such compensation may be indirectly derived in part from the prosecution of claims against the United States or from contracts or other matters in which the United States is interested.

III.

PROHIBITED ACTS

Such scant judicial interpretation as these statutes have received has shed little or no light on their scope. As reported decisions involving these statutes have been prosecutions where a clear conflict of interest existed. Nor are the opinions of the Attorney General of any great value for determining which acts fall within the prohibition of the statutes, for some of the recent opinions are inconsistent with earlier ones (c. g., 41 Op. Atty. Gen. 483) without overruling or attempting to distinguish the earlier interpretations. So far, there is no judicial authority either for or against the position taken by the Attorney General that no actual conflict of interest need exist before the statutes will apply.* Such was the holding of the opinion of 6 November 1943, to the effect that a WSB appointee in the War Department would be liable to the penalties provided by the statutes simply because he was a member of a law partnership whose practice included tax and municipality claims against the United States. It is manifestly absurd to say that any conflict of interest could arise in such a situation. Nevertheless, such construction is binding upon all agencies of the government and must be taken as correct in any matter involving their own officers and employees.

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* Recently Senator Maloney (D., Conn.) said on the floor of the Senate, "The statutes in question certainly were not enacted on the basis of the present ramification of Federal regulation." 90 Cong. Rec. 3676 (21 April 1944)